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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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POST, BUCKLEY, SCHUH & JERNIGAN,
INC., a Florida corporation,

Plaintiff,

v.

Case No.: 3:08-cv-1239-J-34 HTS

UNITED STATES DEPARTMENT OF THE
ARMY and its component UNITED STATES
ARMY CORPS OF ENGINEERS,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, Post, Buckley, Schuh & Jernigan ("PBS&J") sues the Department of the Army and its component the Army Corps of Engineers (the "Corps") (collectively referred to as the "Department") and states as follows:

INTRODUCTION

1. This action is brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, for declaratory, injunctive, and other appropriate relief, seeking, principally, the immediate production of records concerning the Ten Mile Creek Project requested by PBS&J from the Department.

2. The Corps has violated FOIA by: (i) failing to respond timely to PBS&J's requests for records under FOIA; (ii) failing to timely respond to PBS&J's administrative appeal within the time period mandated by FOIA; (iii) failing to produce the requested records as mandated by FOIA; (iv) asserting inappropriate exemptions as a basis for withholding information to which

PBS&J is lawfully entitled; and (v) failing, in one instance, to provide a sufficient *Vaughn* index, and in another instance failing to provide any *Vaughn* index.

3. PBS&J seeks: (i) a declaration that the records sought are subject to disclosure under FOIA; (ii) affirmative injunctive relief requiring the Corps to conduct immediately an adequate search for the requested records and to produce all responsive records; and (iii) an award of reasonable attorneys' fees and other litigation costs.

4. The FOIA requests at issue in this Complaint were precipitated by the Corps' letter dated February 22, 2008 notifying PBS&J of the Corps' intention to pursue an A-E liability action against PBS&J for services provided on the Ten Mile Creek Project.

5. The information requested by PBS&J is subject to public disclosure under FOIA. Nevertheless, the Department has failed to respond or produce responsive records in a timely fashion.

6. Given the urgency of this matter, PBS&J seeks expedited treatment of this Complaint pursuant to 28 U.S.C. § 1657.

PARTIES

7. PBS&J is a Florida corporation with an office in Jacksonville, Florida. PBS&J is a nationwide provider of architecture, engineering, and construction services.

8. Defendant United States Department of the Army is a department within the executive branch of the United States government. Defendant United States Army Corps of Engineers is a component unit of the Department of the Army and is responsible for planning, designing, building and operating water resources and other civil works projects. Both defendants are agencies of the United States within the meaning of 5 U.S.C. § 552(f)(1). The Department has possession and control of the records requested by PBS&J.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction of this action and personal jurisdiction over the Department pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

10. Venue is premised on PBS&J's place of business and is proper in this district under 5 U.S.C. § 552(a) (4) (B). In addition, the FOIA requests in question were propounded upon the Corps' Jacksonville District office and all documents, materials and things requested, but not yet produced are believed to be located in the Corps' Jacksonville, Florida district office.

11. Declaratory relief is authorized by 28 U.S.C. §§2201-2202 and Rule 57, Fed. R. Civ. P.

GENERAL ALLEGATIONS

A. PBS&J's FOIA Request No. 08-141.

12. PBS&J submitted a FOIA request on March 28, 2008. (See Exhibit 1). The Corps assigned this request number 08-141.

13. The FOIA request was in response to the Corps' letter dated February 22, 2008 notifying PBS&J of the Corps' intention to pursue an A-E liability action against PBS&J, identifying seven issues allegedly supporting the Corps' claim of A-E liability, and ultimately stating that the Corps intended to seek damages for more than \$15 million from PBS&J. (Exhibit 2).

14. For the purpose of investigating and evaluating the Corps' claims and preparing its defense, PBS&J requested documents specifically associated with the specific issues outlined in the Corps' letter. In short, PBS&J requested the Corps' proof of its alleged claim against PBS&J and cognizant of the timeframes involved in matters associated with disputes arising under contracts with governmental entities, needed such information without delay. As alleged

below, the Corps' failed to timely respond in good faith and, upon information and belief, knowingly delayed its response in an effort to enhance its position at the expense and to the prejudice of PBS&J.

15. The Corps' Office of Counsel notified PBS&J that a response to the March 28, 2008 FOIA request would be forthcoming by April 25, 2008. (Exhibit 3).

16. Notwithstanding the foregoing, no records were received by April 25, 2008, and in a letter dated May 14, 2008 (49 days after the initial request), the Corps informed PBS&J that the estimated processing cost to respond to the FOIA request would be at least \$53,000.¹ (Exhibit 4).

17. After several attempts and requests for contact (which went unanswered), PBS&J was finally able to get an audience with the Corps' representative in an effort to obtain the requested documents.

18. As a result of the audience between the Corps and PBS&J wherein agreement was reached regarding the "permissible scope" of PBS&J's request, PBS&J submitted an additional FOIA request dated June 26, 2008 wherein PBS&J identified key requests for records to be produced as soon as possible so that PBS&J could proceed with preparing its defense. (Exhibit 5).

19. Although the items requested in the June 26, 2008 FOIA request could be easily and readily identified and produced, the Jacksonville District Counsel by letter dated September 24, 2008 (90 days after the June 26 request and 180 days after PBS&J's initial request) denied

¹ The estimated processing cost is unreasonably high especially given the fact that the documents and things requested are the basis of the Corps' claims against PBS&J in the A-E liability action and undoubtedly have been culled and referenced by the Corps in constructing its claims against PBS&J. PBS&J responded to the Corps' fee letter on May 23, 2008.

the request for items 1, 2, 3, 6 and 7, and only released a portion of the records responsive to the remaining requests. (Exhibit 6).

20. Records responsive to items 1, 2, 3 and 6 were withheld on the basis of the fifth exemption of FOIA, § 552(b)(5), specifically the deliberative process privilege and the attorney work product privilege.

21. Item 7 of the June 26 request sought information and documents specifically referenced by Dr. Bromwell, the Corps' retained expert witness, in a March 12, 2008 meeting between PBS&J, MACTEC and Army Corps of Engineers representatives. Despite such clarity, the Corps' withheld records responsive to item 7 because the request "does not reasonably describe specific documents that can be located in a system of records."

22. The Corps further advised PBS&J of its right and obligation to appeal – to the Corps' – regarding the Corps' actions and failure to produce the documents, materials and things requested. Accordingly, on October 24, 2008, PBS&J filed a timely appeal of the denial of its FOIA request number 08-141 with the Army General Counsel. (Exhibit 7). The remaining requests made by PBS&J contained in its letters of March 28, 2008 and June 26, 2008 are deemed to have been denied by operation of FOIA because of the Corps' inexplicable and undue delay in producing responsive documents lawfully requested.

23. Pursuant to § 552(a)(6)(A)(ii), the Army General Counsel had twenty (20) days, excluding Saturdays, Sundays and legal holidays, to make a determination on the appeal. As such, the Army General Counsel's response to PBS&J's administrative appeal of FOIA request number 08-141 was due on November 25, 2008.

24. As of the date of filing of this Complaint, PBS&J has not received a determination of the administrative appeal.

25. The Department failed to respond to the administrative appeal in the time frame provided by FOIA. Therefore, PBS&J has exhausted its administrative remedies with respect to this request and is entitled to bring this suit. § 552(a)(6)(C).

26. By letter dated November 10, 2008, the Corps provided a "final release" of documents in response to this FOIA request and denied any requests to which a response had not yet been given. (Exhibit 8). Certain of these documents had been redacted on the basis of the sixth exemption of FOIA, § 552(b)(6), which is the personal privacy exemption.

27. Included with this letter, the Corps provided what purports to be a rudimentary privilege index ("*Vaughn* Index"). PBS&J is without knowledge as to whether this information is inclusive of all of the records withheld by the Department regarding FOIA request number 08-141.

28. The Department is required to provide a *Vaughn* Index providing sufficient identifying information about the documents and information withheld and the basis for withholding each record in order to enable the requester of information to determine whether there is an adequate factual basis for the asserted privilege.

29. The Corps' purported *Vaughn* Index did not identify in detail which portions of the withheld documents are disclosable and which are allegedly exempt.

30. The Department failed to specifically identify the reasons why a particular exemption is relevant and further failed to correlate those claims with the particular part of a withheld document to which such exemption applies.

31. In addition to the foregoing, the purported *Vaughn* Index is insufficient because the names and e-mail addresses on correspondence have been redacted. As for e-mail

communication, for a *Vaughn* Index to be complete, it must include a description of each e-mail's author and recipient, and a description of the contents of the e-mail.

32. The Department also failed to provide the reasonably segregable portions of the withheld records as required by 5 U.S.C. § 552(b).

B. PBS&J's FOIA Request No. 08-263.

33. On August 6, 2008, PBS&J submitted a FOIA request for certain documents, materials and things relating to the Ten Mile Creek Project ("the Arcadis documents"). (Exhibit 9). The Corps assigned this request number 08-263.

34. By letter dated September 9, 2008, the Corps' District Counsel denied PBS&J's request for the Arcadis documents on the basis of the fifth exemption of FOIA, § 552(b)(5), specifically citing the deliberative process privilege and the attorney work product privilege. (Exhibit 10).

35. The Department failed to provide a *Vaughn* Index or identify in detail which portions of the withheld documents are disclosable and which are allegedly exempt.

36. The Department failed to specifically identify the reasons why a particular exemption is relevant and further failed to correlate those claims with the particular part of a withheld document to which such exemption applies.

37. As of the date of filing of this Complaint, the Department has not provided a *Vaughn* Index in response to FOIA request number 08-236.

38. The Department failed to provide any of the reasonably segregable portions of the withheld records as required by 5 U.S.C. § 552(b) in response to FOIA request number 08-236.

39. On October 24, 2008, PBS&J filed a timely appeal of the denial of its FOIA request number 08-236 with the Army General Counsel. (Exhibit 11).

40. According to § 552(a)(6)(A)(ii), the Army General Counsel had twenty (20) days, excluding Saturdays, Sundays and legal holidays, to make a determination on the appeal. As such, the Army General Counsel's response to PBS&J's administrative appeal of FOIA request number 08-236 was due on November 25, 2008.

41. As of the date of filing of this Complaint, PBS&J has not received a determination of the administrative appeal.

42. The Department failed to respond to the administrative appeal in the time frame provided by FOIA. Therefore, PBS&J has exhausted its administrative remedies with respect to this request and is therefore entitled to bring this suit. § 552(a)(6)(C).

43. PBS&J retained the undersigned attorneys in order to pursue its rights and has agreed to pay reasonable attorneys' fees.

COUNT I

(Violation of FOIA for failure to timely respond to PBS&J's requests)

44. This is an action pursuant to 5 U.S.C. § 552.

45. PBS&J realleges and incorporates by reference paragraphs 1 through 43 as if fully set forth herein.

46. Pursuant to FOIA, PBS&J requested government records from the Department concerning the Ten Mile Creek Project.

47. The Department failed to respond to PBS&J's requests in a timely manner.

48. The Department's failure to respond to PBS&J's requests in a timely manner violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the Department's own regulations promulgated thereunder.

COUNT II

(Violation of FOIA for failure to make records promptly available)

49. This is an action pursuant to 5 U.S.C. § 552.

50. PBS&J realleges and incorporates by reference paragraphs 1 through 43 as if fully set forth herein.

51. Pursuant to FOIA, PBS&J requested certain government records.

52. The Department has failed to provide records responsive to PBS&J's requests.

53. PBS&J has a statutory right to the records it seeks. *See* 5 U.S.C. § 552(a)(3).

54. The Department has improperly withheld the records in question.

55. The Department has asserted inapplicable exemptions.

56. The requested information that the Department has withheld under Exemption 5 is not subject to that exemption because, for example, the records were not prepared by a government agency and the requested information would not normally be privileged in the civil discovery context.

57. Likewise, the Department's basis for withholding information responsive to item 7 of FOIA request number 08-141 is insufficient because, for example, the Corps understood specifically what was being requested.

58. Finally, the requested information that the Department has withheld under Exemption 6 is not subject to that exemption because, for example, release of the requested information will not constitute a clearly unwarranted invasion of privacy, and because any privacy rights the Department might allege are outweighed by the public interest in disclosure.

59. The Department's failure promptly to make available and to release the documents requested by PBS&J violates FOIA. 5 U.S.C. § 552(a)(3)(A).

Count III

(Failure to conduct an adequate search for responsive records)

60. This is an action pursuant to 5 U.S.C. § 552.

61. PBS&J realleges and incorporates by reference paragraphs 1 through 43 as if fully set forth herein.

62. PBS&J properly submitted FOIA requests to the Department requesting records that are public records subject to FOIA.

63. Upon information and belief, the Department possesses additional records responsive to the FOIA requests which the Department has not provided to PBS&J.

64. Accordingly, the Department conducted an inadequate search for records responsive to the FOIA requests in violation of 5 U.S.C. § 552(a)(3).

Count IV

(Failure to provide a *Vaughn* Index)

65. This is an action pursuant to 5 U.S.C. § 552.

66. PBS&J realleges and incorporates by reference paragraphs 1 through 43 as if fully set forth herein.

67. The Department failed to adequately articulate with particularity a basis for the FOIA exemptions asserted. With respect to Request No. 08-263, a *Vaughn* Index was not provided, and the Department failed to provide any explanation as to how the withholding of a particular document in its entirety correlates specifically and unambiguously to a corresponding FOIA exemption. With respect to Request No. 08-141 an insufficient *Vaughn* Index was provided.

Count V

(Failure to provide the reasonably segregable portions of records requested)

68. This is an action pursuant to 5 U.S.C. § 552.

69. PBS&J realleges and incorporates by reference paragraphs 1 through 43 as if fully set forth herein.

70. The Department failed to provide any of the reasonably segregable portions of the records in question as required by 5 U.S.C. § 552(b).

REQUEST FOR RELIEF

WHEREFORE, PBS&J respectfully requests that this Court:

- (A) Expedite consideration of this Complaint pursuant to 28 U.S.C. § 1657;
- (B) Declare that the Department's failure to provide responsive documents is unlawful under FOIA;
- (C) Declare that the Department's failure to make a timely determination with respect to PBS&J's FOIA requests and notify PBS&J thereof is unlawful under FOIA;
- (D) Declare that the Department's failure to make a timely determination with respect to PBS&J's FOIA appeal is unlawful under FOIA;
- (E) Enter an affirmative injunction that directs the Department to conduct an adequate search for and produce the requested records to PBS&J, as provided by 5 U.S.C. § 552(a)(4)(B), unredacted and without any further delay;
- (F) Award PBS&J its costs and reasonable attorneys' fees in this action, as provided by 5 U.S.C. § 552(a)(4)(E); and
- (G) Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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